IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 248

MEMPHIS LIGHT, GAS AND WATER DIVISION,
Petitioner

v.

UNITED GAS PIPE LINE COMPANY

REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION

REUBEN GOLDBERG
1250 Connecticut Avenue
Washington, D.C. 20036

GEORGE E. MORROW
Union Planters National Bank Building
Memphis, Tennessee 38103

Attorneys for Memphis Light, Gas and Water Division, Petitioner

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I.

United Gas Pipe Line Company ("United") has made no effort, in its brief in opposition, to show that its application for rehearing preserved for court review the Commission's inclusion of United in the regulated category of companies under the Commission's tax allocation formula. It could not do so successfully. United only asserts that the ruling of the court below that United did preserve the issue, if error, is not the kind of error that should concern this Court because the error is "*sui generis* to United and the facts of this case", involving only determination of "the sufficiency or insufficiency of United's specification of error" (Br. in Opp., pp. 5, 6).

But more is involved. At stake, in the ruling of the court below, is the statutory plan for the orderly disposition of issues by the Commission and their review by the courts. In adopting its tortured reading of United's assignment of error, the court below, contrary to decisions of this Court, rested on its interpretation of the requirements of Section 19 of the Natural Gas Act as merely technical, which, if adhered to, would make "pleading an end unto itself" (388 F.2d at 388).

The Section 19 requirements are not technical. Their obvious purpose is to enable the Commission in the first instance to know the specific objection and to enter an order responsive thereto prior to its presentation to the court, thereby providing a basis for judicial review of the Commission's action on the objection.[1]

This case presents a classic example of what the requirements of Section 19 were intended to prevent. The Commission was never given notice by United of the objection it is pressing in the courts and the Commission has, therefore, never been given the opportunity to enter a responsive order. Nevertheless, without the benefit of a Commission order on the objection, the court below, instead of limiting its role to that of review, has assumed the Commission's role and substituted its judgment for the Commission's on the requirements and application of the tax allocation formula.

The error of the court below is, therefore, not *sui generis* and limited to the facts of this case. The error involves and challenges the continued effectiveness of the statutory allocation of duties and responsibilities between the Commission and the courts.

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[1] The cases cited by United in note 4, page 6, of its brief in opposition do not aid United. In those cases, the objections had been expressly raised in the applications for rehearing and had been the subject of Commission orders.

II.

United misrepresents Petitioner's position, on the Commission's inclusion of United in the regulated category of companies under the tax allocation formula, by characterizing it as an argument that the "separation principle" of the *Panhandle* case (*Panhandle Eastern P.L. Co. v. FPC*, 324 U.S. 635, 641) should not be applied with respect to United's tax allowance (Br. in Opp., p. 11).

The undisputed fact is that the Commission, in accordance with the "separation principle" of the *Panhandle* case, utilizing its traditional, judicially-approved, cost allocation principles, did allocate United's cost of service, including the federal income tax component between jurisdictional and non-jurisdictional business. No one has questioned that allocation at any phase of this case. This case, therefore, contrary to the ruling of the court below and to United's brief in opposition, does not involve and does not offend the "separation principle".

Under the Commission's tax allocation formula, the participants in the consolidated tax return are first separated into "regulated" and "unregulated" groups.[2] The purpose of this classfication is to determine the portion of the total consolidated tax that should be assigned to the "regulated" group for apportionment among each member of the "regulated" group. The Commission placed United in the "regulated" group. It made no error in thus applying the tax allocation formula, which this Court has already approved and has held does not violate the "separation principle". The

[2]United and the court below confuse this "regulated" and "unregulated" classification, as used in the tax allocation formula, with "jurisdictional" and "non-jurisdictional", and use them interchangeably. This leads to the confusion in United's brief in opposition and undoubtedly led the court below into its error. "Regulated" under the tax formula includes sales that are subject to any regulation, be it federal, state, or municipal, whereas "jurisdictional" refers only to sales that are subject to Commission jurisdiction. This distinction must be kept in mind.

court of appeals ruled that the Commission did not apply the tax allocation formula correctly to United in deriving United's share of the consolidated tax. The court overlooked the fact that the rate-making process provides for United's share of the tax to be allocated between jurisdictional and non-jurisdictional business.

On the erroneous belief that the "separation principle" of *Panhandle* had been violated, the court below imposed a revision of the formula that would make it *impossible* for the Commission to compute a federal income tax cost for the company as a whole which would then be allocated between jurisdictional and non-jurisdictional business. This revision of the formula would be of general application and would not be limited to the facts of this case. The court's formula would require the Commission to separate the company's income tax *first* between "regulated" and "unregulated" activities—*then* again allocate the "regulated" portion of the tax cost between "jurisdictional" and "non-jurisdictional" business of United.

As a practical matter the ruling below leaves the Commission powerless to require that the consumers of United's gas benefit from the fact that the corporation as a whole experienced an effective tax rate of 50.04% instead of 52%. The court assigned all of the deductions generated by the "unregulated net tax losses" of the other corporations in the consolidated group against a *portion* of United's income. The ruling of the court below flies in the face of the realities of the situation and deprives the Commission of the power to include in cost of service only expenses actually incurred. It also would create without justification a priority for a segment of the company's activities which this Court has rejected, saying (386 U.S. at 246):

> "The Commission's formula, of course, prefers neither concern but allocates the tax liability equitably between each regulated member, without regard to the source of the regulation."

III.

United argues that review by this Court is premature because "there are unanswered factual determinations to be made by the Commission pursuant to the remand of the Court of Appeals" (Br. in Opp., pp. 8-9). The argument is frivolous.

The merits of the issues raised by Memphis and the Government do not depend on the factual determinations. The factual determinations are irrelevant and will never be made should Petitioners be sustained on either of the questions presented in their respective petitions.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court below reversed without further briefs or argument since the decision of the court below is so clearly contrary to, and in conflict with, the evidence and decisions of this Court on the questions presented.

Respectfully submitted,

REUBEN GOLDBERG
1250 Connecticut Avenue
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Memphis, Tennessee 38103

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